

VIRGINIA SUBDIVISION AND SITE PLAN LAW

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After your client has obtained the rezoning, special exception, special permit, conditional use permit, or variance, their interaction with the development review authorities of the local government will continue. Except for an individual single family detached home, almost all real estate development will require the approval of either a site plan or a subdivision plat.

I DILLON'S RULE

Any discussion of local governmental actions in Virginia must start with Dillon's Rule (John Forrest Dillon, *Commentaries on the Law of Municipal Corporations*, 4th ed. (Boston: Little Brown and Company, 1890), p. 145) which is used by Virginia courts to construe strictly any ambiguities in enabling authority against localities.

Dillon's Rule is quite vigorous in Virginia. During preparation of the current Constitution of Virginia in 1969 and 1970, consideration was given to repudiating Dillon's Rule, See *Report to Commission on Constitutional Revision* (1969) 228-83, but such provisions were not incorporated in the new Constitution and the Virginia Supreme Court has interpreted that failure as a reaffirmation of the rule in Virginia. See *Commonwealth v. County Board of Arlington*, 217 Va. 558, 574 (1977).

Dillon's Rule was first recognized by the Virginia Supreme Court in *City of Winchester v. Redmond*, 93 Va. 711 (1896).

The rule is set forth most fully in *Commonwealth v. County Board of Arlington*, 217 Va. at 574, which stated that localities have only those powers (1) expressly granted, (2) necessarily or fairly implied from express grants, and (3) those that are essential and indispensable. Any doubt about the existence of authority is construed against the locality. See also *Hylton Enterprises v. Board of Supervisors of Prince William County*, 220 Va. 435 (1979), and *Lawless v. County of Chesterfield*, 21 Va. App. 495, 502 (1995) where the Virginia Court of Appeals elaborates on the rule as applied to a local land use regulation and states that "We will not imply a grant of power from the legislature's silence."

The force of Dillon's Rule in Virginia is evident from the strictness with which the Virginia Supreme Court has applied the rule. Unless the legislature has provided an express grant of the power in question, the

Court rarely upholds local authority to exercise that power. See, e.g., *County Bd. of Arlington County v. Brown*, 229 Va. 341 (1985) (authority to lease "unused" county land does not allow a locality to lease parking lot to a developer); *Tabler v. Board of Supervisors*, 221 Va. 200 (1980) (authority to regulate trash does not allow a locality to require deposits on disposable containers); *Board of Supervisors of Fairfax County v. Horne*, 216 Va. 113 (1975) (authority to require subdivision plat approval does not allow locality to suspend acceptance of applications for such approval).

This principle was re-emphasized in the *Glazebrook v. Board of Supervisors of Spotsylvania County*, 266 Va. 550 (2003) and *Gas Mart v. Board of Supervisors*, 269 Va. 334 (2005) opinions, where our Supreme Court ruled that the failure to comply with the notice requirements of §15.2-2204 deprived the local government of the power to amend its zoning ordinance. Thus, the amendments were rendered void *ab initio*.

A. Implied Powers

The Supreme Court of Virginia will usually imply local power only when an expressly granted power would be rendered ineffective without such an implication. See, e.g., *City of Chesapeake v. Gardner Enterprises, Inc.*, 253 Va. 243 (1997) (the authority to regulate existing structures associated with non-conforming uses must be implied from the authority to prohibit the construction of new structures in support of the non-conforming use otherwise the purpose behind granting the authority to regulate existing structures would be thwarted); *Gordon v. Board of Supervisors of Fairfax County*, 207 Va. 827 (1967) (a locality's authority to create a commission to develop an airport implies the power to lend money to that commission because otherwise the commission could not be effective); *Light v. City of Danville*, 168 Va. 181 (1937) (locality's authority to build dam implies the power to condemn land for that purpose).

The Court looks to the purpose and objective of statutes in considering whether authority is necessarily implied from powers expressly granted. See *Gordon v. Board of Supervisors of Fairfax County*, 207 Va. 827 (1967) and *Pony Farm Associates, LLP v. City of Richmond*, 62 Va. Cir. 386 (2003).

A statute must be given a rational interpretation consistent with its purposes and not one which will substantially defeat its objectives. *Mayor v. Industrial Dev. Auth.*, 221 Va. 865 (1981).

If there is a reasonable doubt about whether legislative power exists the doubt must be resolved against the existence of the

asserted authority. *City of Richmond v. Confrere Club of Richmond*, 239 Va. 77 (1990). However, when an enabling statute is clear and unambiguous, its intent is determined from the plain meaning of the words used and, in that event, neither rules of construction nor extrinsic evidence may be employed. *Id.*; *Marsh v. City of Richmond*, 234 Va. 4, 11 (1987).

Consistent with the necessity to uphold legislative intent, the doctrine of implied powers should never be applied to create a power that does not exist or to expand an existing power beyond rational limits. The test in application of the doctrine is always reasonableness, in which concern for what is necessary to promote the public interest is a key element. See *Id.*; *National Linen Service v. City of Norfolk*, 196 Va. 277, 281 (1954).

B. Corollaries to Dillon's Rule

A corollary to Dillon's Rule is codified in *Va. Code* § 1-13.17 which prohibits the enactment of ordinances that are inconsistent with the laws of the United States or the Commonwealth. *Blanton v. Amelia County, et al*, 261 Va. 55 (2001).

Another corollary to Dillon's Rule is the "reasonable selection of method rule" which permits localities to exercise reasonable discretion in the implementation of expressly granted authority where the enabling act fails to specify any method of implementation.

The reasonable selection of method rule is premised upon the proposition that because a grant of power is general in its terms, the necessary means for carrying into execution the power granted must be implied before the authority may be exercised. *Marsh, supra*.

The real difference between Dillon's Rule and the "reasonable selection of method" rule is that, under the former, any doubt is resolved against the existence of the power while, under the latter, the doubt is resolved in favor of the method selected to exercise the power. *Id.*

II. SITE PLANS AND SUBDIVISION PLATS DISTINGUISHED

Site plans are creatures of the zoning act. Local governments are authorized to require site plans (also known as "plans of development") pursuant to §15.2-2286(A)(8) of the Code of Virginia. A local government may adopt a zoning ordinance. §15.2-2280. In order to engage in site

plan review, a local government must have adopted a zoning ordinance. Va. Atty. Gen. Ops. No. 05-011 (2005)

The requirements for site plans have become more sophisticated as local governments have come to require greater detail to be disclosed on the site plan. Where once a crude drawing, which proved compliance with the setback requirements of the zoning ordinance satisfied local government's requirement for site plans; today, site plans are required to incorporate plans and profiles of water lines, sewer lines and storm drains, as well as storm water management ponds, parking lot detail, including the size of spaces and travel aisles, driveway apron detail, parking area profiles, curb detail, sidewalk specifications and landscaping plans, with individual plant species identified.

Frequently, the preparation of a site plan will include the preparation of a dedication or easement plat, which, when recorded, will transfer to the local government utility easements and the fee interest in widened right-of-ways. See §15.2-2270.

The Subdivision Act is set out in Title 15.2, Chapter 22, Article 6, §15.2-2240 through §15.2-2279 of the Virginia Code. Pursuant to §15.2-2251 of the Virginia Code, the planning commission shall prepare and recommend a subdivision ordinance to the governing body for adoption after a public hearing for which notice has been given pursuant to §15.2-2204. The subdivision ordinance and any amendments thereto are to be recorded among the land records of the circuit court in which the local government is located. §15.2-2252. Only the planning commission and the governing body may initiate amendments to its subdivision ordinance. §15.2-2253. When the governing body refers a proposed amendment, the planning commission is to adopt its recommendation regarding the proposed amendment within 60 days of the governing body's referral of the proposed amendment to the planning commission. §15.2-2253.

The end product of the subdivision process is the recordation of a plat among the land records of the circuit court, dividing a larger tract of land into smaller tracts of land, most typically house lots, and dedicating the streets and utility easements to the local government. Once the local government has adopted a subdivision ordinance, no plat subdividing land may be recorded among the land records without evidence that such plat of subdivision has been approved by the local government. §15.2-2254(2). No person may subdivide land without the approval of the subdivision plat by the local government. §15.2-2254(1).

While subdivisions and site plans are creatures of separate portions of the Virginia Code and separate ordinances, site plans and subdivisions are subject to similar review and appellate procedure. §15.2-2246 and §15.2-

2258 both provide that site plans are to be treated as subdivision plats, *mutatis mutandis*.

III. EXEMPTIONS FROM THE SUBDIVISION ACT

Exemptions from the subdivision ordinance must be framed as divisions of land which do not fall within the definition of "subdivision" within the local government's subdivision ordinance. Va. Atty. Gen. Ops. 1982-83, p. 374.

As defined in §15.2-2201, the term "Subdivision":

P *unless otherwise defined in a local ordinance adopted pursuant to §15.2-2240*, means the division of a parcel of land into **three** or more lots or parcels of less than **five acres each** for the purpose of transfer of ownership or building development, or, if a new street is involved in such division, any division of a parcel of land. . . . (Emphasis added.)

The definition clearly implies that the division of a tract of land into two lots is not a subdivision within the State Code. The definition also makes clear that the division of a tract of land into parcels where each parcel contains five acres is also not a "subdivision." However, local governments have the power to revise this definition. Prince William County defines "subdivision" to exempt divisions where each lot contained ten acres or more. Note also that the definition references each lot. It is generally held that the definition of "lot" applies to the residue of a parent tract from which a parcel is divided. For example, where the local government has defined "subdivision" to be a division of a tract into two or more parcels containing less than ten acres, an owner of a nineteen-acre tract who desires to deed a third party any portion of that nineteen acres would need to obtain the approval of the local government under its subdivision ordinance.

The Attorney General has opined that the local government may provide in its subdivision ordinance for a determination of nonapplicability of the ordinance as a precondition of recordation of a plat that is not subject to the ordinance. Va. Atty. Gen. Op. 1987-88, p. 208. The Attorney General has also opined that local government cannot require boundary plats to receive planning commission approval under the Subdivision Act prior to recordation. Va. Atty. Gen. Op. 08-105. The Attorney General has further opined that localities may not review and approve boundary surveys or physical survey plats under the Subdivision Act.

A. Partition.

The Supreme Court of Virginia has held that the power of a commissioner in chancery to divide land in response to a petition for partition is not subject to the Subdivision Act. However, the Supreme Court did recognize that, after the partition is granted and the land is divided, the owners of the divided parcels may not be able to use the land until the parcels are brought into compliance with the Subdivision and Zoning Acts. *Leake v. Casati*, 234 Va. 646 (1988).

B. Family Subdivision.

Several sections of the Subdivision Act provide for the division of land for conveyance by the land owners to a relative, e.g., §15.2-2244 and §15.2-2244.1. The advantage of division of land under this provision is that such a lot need only have a reasonable right-of-way connection to a public street which right-of-way shall not be less than ten feet, no more than twenty feet. The misconception concerning family subdivisions is that somehow they are exempt from the provisions of the local zoning ordinance. Such is not the case, so that the utility of the family subdivision is debatable. See Va. Atty. Gen. Op. 1985-86, p. 83. An individual who has conveyed property in one locality to a qualifying family member is not prohibited from subdividing property in another locality for the same family member. Va. Atty. Gen. Op. No. 99-119 (1999). A locality may require that the remainder parcel of a family subdivision have reasonable right of way access to a public roadway. Va. Atty. Gen. Op. No. 03-104 (2004). An unadopted stepchild is not an "offspring" under the family subdivision provisions of the State Code. Va. Atty. Gen. Op. No. 04-003 (2004).

C. Boundary Line Relocation.

Section 15.2-2275 permits the adjustments of boundary lines between two lots either by a plat of subdivision, a plat of resubdivision or deed. Frequently, local ordinances exempt boundary line adjustments from the more extensive review to which standard subdivision plats are subjected.

D. Eminent Domain

A physical separation of land caused by an involuntary condemnation by a government authority is not a "subdivision" which requires the action of the owner. *Chesterfield v. Stigall* 262 Va. 697 (2001) A deed in lieu is not a subdivision either absent an

action by the owner. *W&W Partnership v. Prince William County Board of Zoning Appeal*, 279 Va. 483 (2010).

IV. STATUTORY PREREQUISITES FOR APPROVAL

The State Code provides a number of prerequisites which must be incorporated into a subdivision plat as a condition of approval of the plat by the local government:

- The subdivision plat must be prepared by a certified professional engineer or registered land surveyor. §15.2-2262.
- The subdivision plat must include a reference to the source of the subdividing owner's title. §15.2-2262.
- The subdivision plat must incorporate a reference to the place of record of the last instrument in the chain of title. §15.2-2262.
- Where the subdivision is made up of an assemblage of several tracts, the outline of the parent tracts must be shown on the record plat. §15.2-2262.
- The record plat must contain a statement from the owner of the property that the dedication of the right-of-ways of the street to the local government in fee simple is made with the free consent of all the owners of the property. §15.2-2264.
- In "Tidewater, Virginia," as defined by §10.1-2101 (which includes all jurisdictions along interstate I-95, including Fairfax and Arlington Counties), site plans and plats of subdivision shall incorporate a certificate from the owner that all wetland permits required by law shall be obtained before the commencement of grading or other on-site activities. 9 VAC 10-20-120 (11).
- The subdivision plat shall provide for the coordination of streets within and contiguous to the subdivision as to location, widths, grades and drainage. §15.2-2241(A)(2).
- The subdivision plat shall provide for storm water drainage and flood control. §15.2-2241(A)(3).
- The subdivision plat must identify soil characteristics. §15.2-2241(A)(3).
- Identify the dam break inundation zone of impounding structures. 2008 amendment to §15.2-2241(A)(3).

- The subdivision plat must incorporate site-related improvements including streets, curbs, gutters, sidewalks, bicycle trails, drainage and sewage systems, public water lines, retaining walls, storm water management facilities, and traffic signalization. §15.2-2241(A)(5).
- The subdivision record plat shall provide for common easements for cable, gas, telephone and electric service. §15.2-2241(A)(6).
- The subdivision record plat shall provide for monuments at street right-of-way and property lines. §15.2-2241(A)(7).
- Where public sewage is not to be provided for the individual lots, the applicant shall furnish the preliminary opinion from the applicable health official regarding the suitability of a subdivision for subsurface sewage disposal. §15.2-2242(2).
- Where public water or sewage exists, that the buildings to be constructed on the subdivision lots will connect such systems. §15.2-2242(2).
- The drainage district in which the property is located is to be incorporated into the submission. §15.2-2258.
- Any grave or burial sites located on the property are to be identified. §15.2-2258.
- Where local governments have adopted a Tree Replacement Ordinance, tree replacement is to be incorporated into the subdivision or site plan. §15.2-961(B).
- The subdivision record plat shall provide erosion and sediment control measures. §10.1-560 *et seq.*
- A locality may require the submission of a Phase I and Phase II environmental assessment. §15.2-2242(2).
- Chapter 491 of 2008 added §15.2-2243.1 which authorizes local governments to require a study of the spillway characteristics of an impoundment structure.
- Chapter 491 of 2008 also amends §15.2-2258 to require the final plat to show any mapped dam break inundation zone.

Most of the foregoing information, particularly the plans and profiles for the streets and utilities, is not incorporated into the plat which is recorded in the land records of the circuit court, but rather is incorporated into supplementary drawings frequently referred to as the "construction plans." These plans incorporate the specifications for the construction details as well as the plans and profiles of the roads and the utilities.

A. Construction Design Manual.

Almost every jurisdiction adopts a manual into which is incorporated the specifications for the roads, public utilities, storm water management facilities, curb, gutter, water lines, erosion and sediment control measures, street lights, fire hydrants, traffic signalization, cross walks, sidewalks, maximum and minimum sloping and other construction details. While frequently maintained in a separate volume from the zoning or subdivision ordinance, these design manuals are incorporated by reference into both the zoning ordinance and the subdivision ordinance. As a result, any changes to the local design manual must be adopted in the same manner as an amendment to the zoning and/or subdivision ordinance in order to be valid and enforceable.

B. Private Streets.

Local governments have the authority to approve subdivisions with private streets and no rights in those private streets will pass to the general public upon approval and recordation of the subdivision plan. Va. Atty. Gen. Op. 1982-83, p. 273. Private streets occur most frequently in townhouse development. Most private streets are incorporated into the common area of a subdivision. Private streets within a subdivision not dedicated to the local government are subject to taxation. Va. Atty. Gen. Op. 1980-81, p. 343, *but see, Lake Monticello Homeowners Association v. Ritzer, Commissioner*, 229 Va. 205 (1985). Although the ownership of private streets will not convey to the local government upon the recordation of the subdivision plat, local governments may adopt standards for the construction of private streets as part of their subdivision ordinance and may require the bonding of the construction of those streets. §15.2-2242(3). Where private streets which are not to be dedicated are incorporated into a subdivision, the plat must contain a statement advising that the private streets will not be maintained by the local government. §15.2-2242(3). Where an area that is not specifically dedicated for public street purposes is, however, configured as a street stub and is labeled "reserved" by the subdivider, dedication of the street stub will not

occur upon the recordation of the plat. *Hurd v. Watkins*, 238 Va. 643 (1989), *Turk v. County of Spotsylvania*, 56 Va. Cir. 198 (2001).

C. Preliminary Plats.

As is obvious from the foregoing, the preparation of a full set of construction plans and record plats can be a time consuming and expensive endeavor for any land owner. Frequently, the subdivision ordinance and the design manual present the owner/developer and the engineer with a series of challenges which might be met in a number of various ways.

There came a time when land owners wanted enter to dialog with the local government to explore the choices presented to the subdivider, without the necessity of the preparation of complete construction drawings. The legislature ratified this practice with the adoption of what is now codified as §15.2-2260. A review of that section will demonstrate that, unlike the previously referenced provisions of the Subdivision Act, preliminary plans are permitted by State Code and **not required**. However, a large number of local jurisdictions now require the submission and approval of a preliminary plat as a prerequisite to the submission and approval of a subdivision record plat.

When submitted, preliminary plans are to be reviewed by the local government within sixty days of submission. §15.2-2260(A). However, where the preliminary plat contains information which must be reviewed by a state agency, such as the Virginia Department of Transportation, such agency will review the preliminary plat within forty-five days. §15.2-2260(B). Where a preliminary plan must be reviewed by a state agency, the local government will complete its review within thirty-five days after their completion of the review of the preliminary plat by the state agency. §15.2-2260(B). However, in no event shall a local government review of a preliminary plan extend more than ninety days. §15.2-2260(C). When a preliminary plat is referred to a local water and sanitation authority for comment, that authority is not required to forward its comments within the forgoing time period, however, the local plat approving authority is not relieve of the obligation to act on the preliminary plat within the timeframes set out in the statute. Va. Atty. Gen. Op. No. 06-055 (2006). A 2007 amendment to §15.2-2260(A) solved this potential problem by requiring public authorities to respond within the same time period as state agencies to a locality's request for review of a preliminary plan. In the event that the local government has failed to act within the time frames provided above, the applicant shall give ten days notice to

the local government, whereafter the applicant may seek approval of the preliminary plat by the circuit court. §15.2-2260(D).

If the local government disapproves the preliminary plan, the applicant may appeal that disapproval to the circuit court within sixty days of the written disapproval. §15.2-2260(E). The circuit court has the power to direct the approval of the preliminary plat. §15.2-2260(D).

D. Fees.

Local governments may charge reasonable fees for the review of the subdivision plan and inspection of the improvements constructed pursuant to subdivision plats. §15.2-2241(9). Section 15.2-107 requires that the establishment of the fees and any increases in those fees may only be enacted after advertising of the governing body's intent to adopt such fees or increases pursuant to §15.2-1427(F).

E. Title Opinion.

Some local government attorneys have required the subdivider to provide the local government with a title policy or a certificate of title as a condition to approval of the subdivision plat. Local government attorneys who impose this requirement previously cited §15.1-285 as the basis for this demand. This section was repealed as part of the 1997 recodification. The only requirements relevant to title are to be found in §15.2-2262, which provides that the plat must incorporate the source of the owner's title to the property together with the identification of the place of the last instrument in the chain of title.

V. REVIEW AND APPROVAL OF THE SUBDIVISION PLAT

Approval of subdivision plats and site plans is a purely ministerial act. No legislative discretion is involved. *Prince William County v. Hylton*, 216 Va. 582 (1976). Compliance with the valid rules and regulations adopted by the local government pursuant to the Subdivision Act entitles the land owner to approval of the subdivision plat. *Board of Supervisors v. Horne*, 216 Va. 113 (1975).

A. Delegation of Approval Authority.

Section 15.2-2255 provides that the approval of subdivision plats is the responsibility of the governing body of the local government. However, by ordinance, the local government may provide that the

approval of subdivision plats is the responsibility of the planning commission or an authorized agent of the local government, such as the director of development administration or the office of site development services. §15.2-2254(2). Such delegation also includes delegation of the power to grant waivers from strict compliance with the localities rules and regulations. *Logan v. City Council of the City of Roanoke*, 275 Va. 483 (2008).

The delegation of approval authority has been a frequent cause of problems for local governments, particularly, when the local government attempts to incorporate into its subdivision ordinance an administrative appeal from the decisions of its authorized agent. In *Fullen v. Kilmarnock*, 22 Va. Cir. 227 (1990), the Circuit Court held that the delegation of the approval authority to a subdivision committee precluded the appeal of that subcommittee's decision to the town council. However, in *Johnson v. Henrico County*, 18 Va. Cir. 445 (1990), where Henrico County had reserved final authority in the governing body, the Circuit Court held that an appeal could be filed from the agent to the governing body.

Local governments may not refuse to accept and review subdivision plats and site plans. *Board of Supervisors v. Horne*, 216 Va. 113 (1975). A local government may not refuse to accept a submission of a site plan or subdivision plat because of some alleged deficiency. Rather, the local government must accept the submission and disapprove the plat based on the insufficiencies of the submission. *Fairview Co. v. Spotsylvania*, 21 Va. Cir. 193 (1990). The local government should make a complete review of all submissions and shall not stop its review when confronted with an issue which it alleges to be a threshold issue. *Dorne v. Fairfax County*, 28 Va. Cir. 133 (1992).

B. Waivers.

Section 15.2-2242(1) permits local governments to incorporate within its ordinance the authority to waive the provisions of its subdivision ordinance and any rules and regulations adopted pursuant thereto. Va. Atty. Gen. Op. No. 04-014 (2004). *Logan v. City Council of the City of Roanoke*, 275 Va. 483 (2008). A circuit court has held that the granting of a waiver is a legislative act and, on appeal, are subject to the “fairly debatable” standard set out in *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514 (1982).

C. Public Hearings.

The Subdivision Act does not require a public hearing to be held before the approval of a subdivision plat or site plan. However, many subdivision ordinances do provide for the holding of a public hearing by either the planning commission or the governing body, or both, before the action of those bodies on the subdivision plat or site plan. When public hearings are required, the provisions of §15.2-2204 are frequently incorporated into the ordinance by reference.

D. Time for Review.

Local governments must act on all subdivision and site plan submissions within sixty (60) days of the submission. §15.2-2259(A). If the local government has not acted on the submission within sixty days, the applicant, upon giving ten days notice to the local government, may ask the circuit court to approve the subdivision plat or site plan. §15.2-2259(B).

HB 721 of 2008 amends §15.2-2259 to provide for preferential treatment of site plans for non-residential development in localities with a population of more than 90,000: if the locality fails to act on such a plan within the timeframes set out in Subsections (A)(3) the plan is deemed approved. Chapter 766 of the Acts of 2010 amended §15.2-2241 to include a reviewing agency with the time limits for review and approval of the plat.

E. Grounds for Disapproval.

Nonconformance of the subdivision plat with the comprehensive plan is not grounds for disapproval of a subdivision plat. *Smith v. Culpeper County*, 22 Va. Cir. 82 (1990). The local government does not have the power to deny approval of subdivision plat based on questions of the property rights of the owner, for example, compliance with the condominium statute or other restrictive covenants. *Dorne v. Fairfax County*, 28 Va. Cir. 133 (1992). Payment of real estate taxes may not be required as a prerequisite to the approval of a subdivision plat. Va. Atty. Gen. Op. 1977-78, p. 285. A local government may not deny approval of a subdivision based on a subdivision ordinance provision giving the local governing body the right to approve the size and shape of the lots or on a subdivision ordinance requirement for adequate public facilities. *Board of Supervisors v. Countryside Invest. Co.*, 258 Va. 497 (1999). *County of Chesterfield v. Tetra Associates, LLC.*, 279 Va. 500 (2010) Local government cannot deny subdivision based

on “suitability of land” provisions of a local ordinance. Va. Atty. Gen. Op. No. 08-070

The failure of an applicant to relocate a road within the subdivision consistent with the government's request is adequate grounds for denial of subdivision plat approval. Va. Atty. Gen. Op. 1977-78, p. 302. Whenever a local government disapproves a subdivision plat or site plan, the local government must identify the deficiencies by reference to specific ordinances, regulations or policies, and generally identify modifications which will permit approval of the subdivision plat. §15.2-2259(A).

A local government may not prescribe minimum time period that a lot must be in existence before that lot's subsequent resubdivision. Va. Atty. Gen. Op. No. 00-55 (2000)

F. Permission to Work In Existing Right-of-Way.

Frequently, the construction of a subdivision will require the developer to work within the right-of-way of an existing public road. Examples include connection of intersections of the internal subdivision roads to the existing public roads, and extension of utilities from the far side of an existing public right-of-way. In such cases, the owner shall present the plans and specifications for such work to the governing body. The governing body or its agent shall have thirty days to approve the construction in the public right-of-way. If the local government fails to act within the thirty-day period, the applicant may, after ten days notice to the local government, submit the request to the judge of the circuit court who shall have the authority to approve the request. §15.2-2269.

VI. EXACTIONS

An exaction is an appropriation of private property for public use in exchange for a development approval; e.g., a subdivision conditions requiring right of way dedication or road construction. An exaction, at common law, was a felony. Virginia's Supreme Court has ruled that it is unconstitutional for a local government to attempt to condition subdivision plat or site plan approval upon a subdivider making a dedication or constructing an improvement when the need for the dedication or improvement is not substantially generated by the proposed development. *James City County v. Rowe*, 216 Va. 128 (1975); *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580 (1984). A local government may not condition subdivision or site plan approval upon improvement to an existing public road even where it can be shown that the need for such

improvement is substantially generated by the proposed development. *Hylton v. Prince William County*, 220 Va. 435 (1979). It should be obvious, then, that the local government may only require a subdivider to build the roads, sewer and water lines, storm drainage facilities, storm management facilities and other improvements when the improvements are required by the proposed development.

A. Pro Rata Fees

However, the legislature has specifically authorized the collection of certain payments from a developer for off-site sewage, water and drainage facilities. §15.2-2243. The need for the sewage, water or storm drainage facility must be necessitated, at least in part, by the proposed subdivision. The local government must have established a general improvement plan which includes the proposed subdivision within its area. Where such a program has been adopted, reasonable fees proportionate to the increased flow from the subdivision, compared to the total increased flow from such area in its fully developed state per the comprehensive plan, may be collected from the developer. In calculating the fee for off-site improvement, the local government must give the subdivider credit for storm water or best manager practice facilities to be built on-site. The local government may allow bonds in place of a cash payment for off-site water, sewage or storm drainage facilities. If the payments for off-site sewer water or storm facilities are not used to construct such facilities within twelve years from the date of posting, the sums will be applied as a credit to the real estate taxes due on the property within the subdivision.

It is useful to note that the following off-site facilities are **not** listed within §15.2-2243:

- Roads
- Schools
- Parks
- Recreation Facilities
- Police Stations
- Fire Stations

Local governments may not require public parks, schools or recreation facilities as a condition of subdivision plat approval. Va. Atty. Gen. Op. 1978-79, p. 255.

However, §15.2-2242(4) & (5) both provide for voluntary road contributions by subdividers. Subsection 4 provides for reimbursement of the costs of off-site road construction through tax

credits, while subsection 5 provides for reimbursement of the developer constructing the roads by other developers in the vicinity of the road construction.

In 2006 the General Assembly added Section 15.2-2242(9) which purports to authorize local governments to require subdividers to build sidewalks along existing public streets to connect to existing sidewalks. Whether this provision is consistent with *Hylton* remains to be seen.

Chapter 491 of 2008 added §15.2-2243.1 which enables local government to require a developer to pay for improvements to existing impoundment structures. This provision's compliance with *Rowe*, *Cupp* and *Hylton* has yet to be tested.

B. Impact Fee Legislation

Authority has been in place since 1989 for Northern Virginia localities to adopted impact fees for “by- right” development. However, no local government was prepared to comply with the analytical requirements which guaranteed compliance with *Rowe* and *Cupp* and exempted projects which had already proffered road improvements. Va. Code §15.2-2317 *et seq.* While some objected to the burdens of the analytical studies required to implement the 1989 Road Impact Fees and the exemption for projects with proffered road improvements, bond counsel would have been very comfortable that these taxing districts passed constitutional scrutiny.

In 2007, the General Assembly enacted amendments to the Road Impact Fee Act which allowed properties within an impact fee service area to be taxed for road improvements which were not in the service area but merely “benefited” the service area. It removed approved rezonings and special exceptions from the baseline analysis. It also appears to authorize double taxation by allowing the imposition of impact fees on property that had already proffered road improvements. Stated differently, will the credit provisions of revised §15.2-2324 be applied in a fashion that passes constitutional muster when applied to projects that had already proffered road improvements.

The 2007 General Assembly went even further by adopting authorizing legislation for impact fees for parks, schools, police, fire, libraries and storm water facilities. Though limited to areas outside “urban transportation service district” (i.e., the lower density parts of localities) and set to expire at the end of 2008 if a locality does not

adopt a urban transportation service district, this enactment constitutes a massive expansion of the impact fee concept bereft of the underpinnings of the constitutionality in the 1989 Road Impact Fee Act

These newly authorized exactions will not only have to survive the tests of *Rowe*, *Cupp* and *Hylton* but also *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 377 (1994) wherein the U.S. Supreme Court ruled that in order for an exaction to avoid the characterization of "taking," the exaction had to be "roughly proportional" to the impact of the development approval. The roughly proportional standard requires that a locality make an "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* 2317-2319.

VII. BONDS

The government does not pay for the construction of the improvements shown on the subdivision plan. §15.2-2268.

Rather as a condition for the approval of a subdivision or site plan, a local government shall require the posting of a bond and surety to guarantee the completion of the public improvements incorporated as part of the subdivision plat or site plan.

The amount of the bond shall not exceed the estimated costs of the construction based on unit prices for new construction in the locality. §15.2-2241(5). The amount of the bond may include an amount for administrative costs, inflation and potential damages to existing roads and utilities. However, these later amounts may not cumulatively exceed 25% of the costs of the constructing the improvements. Chapter 193 of the Acts of 2009 amends §15.2-2241(5) to reduce this percentage to 10% temporarily. That reduction expires on July 1, 2014.

The requirement for bonding may be satisfied by the developer: providing

- (a) paid receipts for the costs of the construction of the improvements to the local government;
- (b) a cash deposit;
- (c) corporate bond and surety;

- (d) contract for construction with contractor's bond; or
- (e) letter of credit.

The form of the bond is the choice of the owner. §15.2-2241(5). The government's approval is limited to the amount of the bond. If the letter of credit option is chosen by the developer, the identity of the bank issuing the letter of credit and the form of the letter of credit are subject to the approval of the local government.

A. Releases.

The subdivision ordinance shall provide for partial and final releases of a subdivision bond. §15.2-2245. The developer must complete construction of not less than 30% of bonded improvements before the application for the first partial release. §15.2-2245(E). The local government may allow partial releases of up to 90% of the bonded amount. No more than three partial releases may be requested by the developer in any twelve month period. §15.2-2245(E). The government must act within thirty days of any request for a partial release. Failure to act within the time period is deemed approval of the partial release. §15.2-2245(B). When denying a request for a partial bond release, the local government must state the deficiency prompting the denial of the bond release and suggest corrective action which will result in release of the bond as requested.

If no action on a final bond release is taken by the local government within thirty (30) days, the developer must send another notice to the chief administrative officer of the local government. If no action is taken by the local government within ten days of such notice, the request for final release is deemed approved. The local government's failure to release the bond can be appealed to the circuit court. On appeal, if no good cause is shown by the local government for its failure to release the bond, the subdivider may recover its costs and attorneys' fees. §15.2-2245(C). The local government may not refuse to release the bonds for any reason not directly related to the specific defects in the facilities covered by the bond. §15.2-2245(D). The local government, therefore, cannot withhold subdivision bond release for violation of the Erosion and Sediment Control Act, failure to make proffer payments or defects in construction of homes within the subdivision.

Once a developer signs a construction contract, without a protest of any obligation illegally imposed by the local government as a precondition to the approval of the subdivision, the developer's right

to challenge the obligation to build the improvement is waived. *Prince William County v. Sie-Gray Development*, 230 Va. 24 (1985) *but, see Thompson v. Fairfax County*, 12 Va. Cir. 318 (1988).

Subdivision bonds are a form of indemnification and are not penal in nature. *Fairfax County v. Ecology 1*, 219 Va. 29 (1978).

B. Maintenance Bond.

The local government may require a maintenance bond to cover the maintenance of roads between the time that the subdivision bond is released and the road is accepted into the state secondary system by the Virginia Department of Transportation. §15.2-2241(5).

VIII. HOMEOWNERS ASSOCIATION DOCUMENTATION

It is common practice in the development of subdivisions for some part of the subdivision to be reserved for open space and recreational facilities. Storm water management facilities are also frequently located within these common areas. Local governments are concerned that provision be made for the maintenance of these common areas. As a result, subdivision and/or zoning ordinances frequently require that approval of subdivision plats are conditioned upon the creation of a homeowners' association by the developer and a review of the organizational documents by the local government attorney.

While homeowners' associations are not generally required to be corporations, it is normal custom and practice for the homeowners' association to be organized as a non-stock corporation under §13.1-801 *et seq.* of the State Code. In addition, the Federal Housing Administration and the Veterans Administration require the preparation of an informational brochure to disclose to buyers using their loan programs, the rights and responsibilities of a homeowner within such owners' associations. As a result, the homeowners' association documents will generally consist of: the articles of incorporation, bylaws, declaration of covenants, conditions and restrictions and an informational brochure.

Chapter 26 of Title 55 of the State Code, §§55-508 through 55-516.2, sets forth a number of specific requirements and procedural safeguards for homeowners which must be incorporated into any homeowners association documentation. The Veterans Administration has issued guidelines for the preparation of homeowners association documents which will satisfy the requirements of that agency. Those requirements can be found in D.V.B. Circular 26-80-34. Attorneys preparing homeowners association documents are well advised to refer to FHA

Form 1400, which contains examples of information brochures, articles, bylaws and declarations of covenants. However, many practitioners find these form documents to be overly simplistic and badly out of date. Both Fannie Mae and Freddie Mac have adopted standards for review and approval of homeowners association documents.

Common areas which are deeded to a property owners' association are to be assessed for real estate tax purposes at a nominal value as a servient estate with the value more accurately reflected in the value of the individual lots in the subdivision as the dominant estate. *Lake Monticello Owners Association v. Ritzer, Commissioner*, 229 Va. 205 (1985). The existence of such covenants will not be imputed from ambiguous notes on the plat of dedication. *Lovelace v. Orange County BZA* 276 Va. 155 (2008).

IX. EFFECT OF RECORDATION

At common law, dedication of land to the government requires acceptance by the government. Section 15.2-2265 supersedes the common law by providing that upon recordation of an approved subdivision, the fee simple interest in all street rights-of-way passes to the local government. Upon dedication, the local government becomes responsible for the maintenance and liable in tort. *Brown v. Tazewell County Water and Sewer Authority*, 226 Va. 125 (1983). However, where the subdivision plat did not comply with the Subdivision Act, no interest is conveyed. *Ryder v. Petrea*, 243 Va. 412 (1992). Recordation of the subdivision plat also transfers ownership of the utility lines to the local government. *Burns v. Stafford County*, 226 Va. 506 (1984). A subdivider may not reserve an interest in a street right-of-way on a subdivision plat. *Humphrey v. Arnold*, 33 Va. Cir. 126 (1993). Recordation of the subdivision plat causes the area within the plat dedicated for public streets to be exempt from taxation. Va. Atty. Gen. Op. 1978-79, p. 253. A conveyance of land by metes and bounds or otherwise in violation of the Subdivision Act will still affect a good transfer of title to the grantee. §15.2-2254(3). *Matney v. Cedar Land Farms*, 216 Va. 932, 937 (1976).

X. GRANDFATHERING/VESTING

There is a difference between grandfathering and vesting, although similar principles underlie both. In the case of grandfathering, the legislative body, adopting a new law, or an amendment to an existing law, makes provision for exemptions for parties meeting certain qualifications. Most often these grandfathering provisions are inserted to protect persons who have already subjected themselves in whole or in part to the regulatory process which is either being imposed or altered by the adopted ordinance. Vesting is the recognition that a landowner has established a

constitutionally protected investment-backed expectation of a development right based on good faith reliance on an affirmative government action followed by diligent pursuit of the exercise of those development rights by incurring of substantial expense. §15.2-2307. *In re: Zoning Ordinance Amendments Enacted by the Board of Supervisors of Loudoun County on January 6, 2003(Consolidated Cases), Chancery #03ZOA000-00 (Consolidated). Memorandum Opinion and Consolidated Decree No. 25. Board of Supervisors v. Medical Structures, 213 Va. 355, 358 (1972); Board of Supervisors v. City Services, 213 Va. 359, 362 (1972).*

Grandfathering can only be accomplished by ordinance and not by past policy and practice. *Parker v. County of Madison, 244 Va. 39 (1992).*

The Subdivision Act has multiple provisions grandfathering subdivisions and site plans. Once a subdivision plat is approved, the plat will remain valid for one year after the final approval or for the time limit provided for the surety. §15.2-2241(8). No change to a subdivision or zoning ordinance will be applicable to a subdivision plat or any development shown thereon for a period of five years after the recordation of the subdivision plat unless such ordinance change is required by mistake, fraud or change of circumstances relating to health, safety and welfare. §15.2-2261. Site plans are also protected from subsequent changes to the zoning and subdivision ordinance for a period of five years from the date of approval of the site plan. Approval of the site plan is defined as being "ready for bonding." The five year grandfathering provisions of §15.2-2261(F) were extended by Chapter 194 of the Acts of 2009 to extend the life of preliminary plans to five (5) years from the date of the last recorded plat applicable to the land shown on the preliminary plat.

Chapter 196 of the Acts of 2009 enacted a new section of the State Code, §15.2-2209.1 which, *inter alia*, extends the lives of all record plats and final site plans valid under §15.2-2260 and §15.2-2261 and outstanding as of January 1, 2009 through July 1, 2014 provided the related surety is kept in full force and effect.

The five-year exemption from the application of subsequent amendments to the zoning and subdivision ordinance may be extended by the local government upon request of the subdivider. Denial of a requested exception is subject to judicial review. The request for judicial review must be filed within sixty days of the denial of the extension. §15.2-2261(B).

Application for modification to a recorded subdivision plat or an approved site plan does not subject the plat or plan to amendments to zoning or subdivision ordinances adopted subsequent to the original approval of the subdivision or site plan. §15.2-2261(D).

Section 15.2-2260(F) provides for five (5) year grandfathering of approved preliminary plans provided a final plat for at least part of the area encompassed by the preliminary plan is submitted for approval within one (1) year and thereafter diligently pursued. *But see* Atty. Gen. Op. No. 05-082 in which Mr. McDonnell appears not to understand that construction plans and profiles are an integral part of the final plat and rules that a locality can cause the preliminary plan to expire by simply refusing to act on the construction plans and refusing to accept the final record plat until the construction plans are approved. *Also* Atty. Gen. Op. No. 08-038 in which the Attorney General asserts that for a multi-phase preliminary plat to have the benefit of this provision the phases must be shown on the preliminary plan. *But see* Chapter 194 of the Acts of 2009, cited above, which appears to be a response to this opinion and to overrule it.

XI. VACATION

In many of the older communities of Virginia, development of real estate frequently takes the form of redevelopment of a portion of previously platted subdivisions. In the course of that redevelopment, it is frequently necessary to remove lot lines, street rights-of-way and easements which were created by previously recorded subdivision plats. Failure to have the local government join in a deed of vacation causes the deed to be a nullity. *Presidential Gardens/Duke Street Limited Partnership v. Salisbury Slye, Ltd.*, 802 F.2d 106 (4th Cir. 1986). Mere common ownership of two adjoining lots will not cause a vacation of lot lines. Va. Atty. Gen. Op. 1984-85, p. 297. Recordation of an approved subdivision plat which shows the termination or extinction of a right-of-way or easement will cause the vacation of that right-of-way or easement except where those interests were acquired by the government by the payment of consideration. §15.2-2265.

Prior to the sale of any lot shown within a subdivision, the person desiring to vacate a portion or all of the plat may do so by two methods: The owners, proprietors and trustees who signed the consent statement in the original subdivision may declare, by recorded instrument, and with the consent of the governing body, a plat vacated and the recordation of the vacation vests title to the property in the original subdividers §15.2-2271(1).

The alternative method is for the governing body to pass an ordinance vacating the plat or portion thereof. §15.2-2271(2). Such ordinance may only be adopted after notice has been given pursuant to §15.2-2204. Anyone objecting to the vacation may make their objections known at the meeting held for the purpose of considering the vacation. An appeal from the adoption of an ordinance vacating the right-of-way may be filed within thirty days of the adoption of the vacation with the circuit court. The court may nullify the ordinance if it finds that the owner of the property objecting to the vacation will be irreparably harmed.

A street or easement shown on a subdivision plat may be vacated after the sale of a lot by recording an instrument signed by all of the owners of the lots shown on the portion to be vacated. §15.2-2272(1). After the sale of a lot, a portion of a plat also may be vacated by ordinance following the procedures described above. §15.2-2272(2).

The Subdivision Act also makes specific provision for the vacation of right-of-way dedication or grant of easement which was made to the local government as a condition of approval of the site plan. The vacation can be affected by: (i) a written instrument of the owner containing the consent of the governing body or its agent; or (ii) adoption of an ordinance of vacation as described above. §15.2-2270.

The government is permitted to charge a fee for the processing of a deed of vacation. However, that fee may not exceed \$150. The clerk is required, pursuant to §15.2-2276, to note the vacation on the original plat.

A. Effect of Vacation.

A street abandoned by local government becomes part of the adjoining lot and passes with that lot even if not specifically referenced in the subsequent deed of that lot. *Tidewater Area Charities, Inc. v. Harbor Gate Owners Association*, 240 Va. 221 (1990). Title passes to the abutting owners immediately upon recordation of the deed of vacation and no further deed need be made by the local government. Va. Atty. Gen. Op. 1980-81, p. 332. Where the right-of-way was internal to the subdivision, the right-of-way will be split along the center line with one-half going to the abutting land owners on each side. Where the right-of-way was on the periphery of the subdivision, all of the right-of-way will go to the abutting land owners within the original subdivision. All reversions of street right-of-ways, however, shall be subject to any utilities which have been erected within the right-of-way. In the case of the vacation of any other land previously dedicated to a local government, title of the land reverts to the original subdivider. §15.2-2274.

In a 1997 case, *Helmick v. Town of Warrenton*, 254 Va. 225, our Supreme Court has ruled that questions of vacation of a subdivision plat are legislative and thus subject to judicial review under the standard requiring the appellant to demonstrate that the local government's action on a request for a vacation is arbitrary and capricious and not "fairly debatable."

XII. JUDICIAL REVIEW

Appeal of a disapproval of a subdivision plat or site plan must be filed within sixty (60) days of the written disapproval with the circuit court

within whose district the land is located. §15.2-2259(C). The board of zoning appeals has no jurisdiction over subdivision denials. *Mason v. BZA*, 25 Va. Cir. 198 (1991). While the Virginia Supreme Court had ruled that mandamus would lie to compel local governments to act on submitted subdivision plats in *Prince William County v. Hylton*, 216 Va. 482 (1976), its ruling in *Umstattd v. Centex*, 274 Va. 541 (2007) suggests that the better approach is an action for declaratory judgment.

A. Standing.

Only the applicant has the right to seek judicial review. Abutting land owners have no right of action to appeal the approval of a subdivision. *Shilling, Trustee et al. v. Jimenez, et al.* 268 Va. 202 (2005). *Miller v. Highland County*, 274 Va. 355 (2007). *Logan v. City Council of the City of Roanoke*, 275 Va. 483 (2008).

However, an abutting landowner has been found to have standing to appeal a vacation of a subdivision road. *Rainbow Forest Baptist Church v. Board of Sup'rs of Botetourt County, et al.*, 66 Va. Cir. 87 (2004).

B. Standard of Review.

A landowner appealing the disapproval of a plat must show that (i) such disapproval is not properly based on the ordinance applicable thereto, or (ii) such disapproval is arbitrary or capricious. §15.2-2259(C).

C. Multiple Submissions.

A land owner cannot pursue the appeal of the disapproval of one subdivision plat and simultaneously pursue the approval by the local government of a subsequent subdivision plat for the same land. *West v. Mills*, 238 Va. 162 (1989).

XIII. ENFORCEMENT

No person shall sell or transfer any land or subdivide any property until a plat has been approved. §15.2-2254(3). The fine for violation of the subdivision ordinance shall be not more than \$500 for each lot or parcel subdivided, transferred or sold. §15.2-2254(4). Conveyance by means of a metes and bounds description does not exempt the person conveying from the fine. §15.2-2254(4).